

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SAEID MOHEBBI,
Plaintiff,

v.

MAHNAZ KHAZEN, et al.,
Defendants.

Case No. [13-cv-03044-BLF](#)

**ORDER
(1) GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO COMPEL
ARBITRATION,
(2) GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS,
AND
(3) STAYING CLAIMS PENDING
COMPLETION OF ARBITRATION**

[Re: ECF 68, 69]

This case arises out of a contractual investment relationship. Plaintiff contends that he agreed to invest over \$1 million into a partnership in exchange for Defendants' assistance in helping him qualify for the federal EB-5 immigrant visa program. He now seeks rescission of this investment contract, and brings a Second Amended Complaint with 22 causes of action against Defendants, who he alleges, among other things, fraudulently induced his investment.

Presently before the Court are two motions brought jointly by all Defendants: a motion to compel arbitration and a motion to dismiss. Defendants argue that the arbitration clause contained in the Engagement Agreement between the parties demands that this Court send the case to binding arbitration. Plaintiff, in contrast, argues that the arbitration clause was induced by fraud and is unconscionable, thus precluding its enforcement.

Having reviewed the papers and oral argument of the parties, and the governing law, the Court GRANTS IN PART AND DENIES IN PART Defendants' motion to compel arbitration. The Court finds that two of Plaintiff's 22 causes of action, claims for false advertising in violation of the Lanham Act and California Business and Professions Code § 17500, fall outside the ambit

of the arbitration agreement. Plaintiff's § 17500 claim previously survived Defendants' first motion to dismiss. The Court finds that Plaintiff's Lanham Act claim states a claim upon which relief could be granted, and therefore DENIES IN PART Defendants' motion to dismiss with regard to that claim. The Court therefore STAYS Plaintiff's false advertising claims pending the completion of arbitration. The Court DECLINES TO CONSIDER Defendants' motion to dismiss with regard to claims referred to arbitration.

I. BACKGROUND

A. Procedural History

This Court previously granted in part and denied in part Defendants' motion to dismiss Plaintiff's First Amended Complaint on June 23, 2014. ECF 64. In that motion, Defendants also asked the Court to dismiss the FAC due to the arbitration clause at issue in this motion. The Court denied that request, and instructed Defendants that they could bring a motion to compel arbitration following the filing of Plaintiff's Second Amended Complaint.

Plaintiff filed his SAC on July 11, 2014. On July 25, 2014, Defendants filed their motions to compel and dismiss. Following briefing, the Court heard oral argument on the motions on November 13, 2014.

Neither party requested in its papers that the Court hold an evidentiary hearing on the motion to compel arbitration. At oral argument, the Court asked the parties on the record whether either party wanted the Court to hold an evidentiary hearing. Both parties declined, and agreed that the Court would take the motion to compel arbitration under submission on the papers.

B. Factual Background

The facts of this case are well-known to the Court and the parties. Plaintiff is a Farsi-speaking Iranian citizen who, in 2012, was interested in obtaining permanent residency in the United States through the EB-5 Immigrant Investor Visa Program. This program allows foreign nationals to obtain a green card if they invest a certain amount of money (generally \$500,000 or \$1 million, depending on certain factors) in the United States. SAC ¶ 26. While living in Iran, he learned about Defendant USIIC through an online Farsi-language video, and, in April 2012, met

with its CEO, Ms. Khazen, in Los Angeles during a trip to the United States. SAC ¶ 30.¹ In this meeting, Khazen and Plaintiff discussed ways in which Plaintiff could invest money with USIIC so as to qualify for an EB-5 visa.² After returning to Iran, Plaintiff received correspondence from Khazen via email regarding the terms of an investment. SAC ¶ 31.

In July 2012, Plaintiff met with Khazen and Michael Shadman in Dubai. SAC ¶ 33. At this meeting, Plaintiff contends that he was presented with an Engagement Agreement, dated July 22, 2012, which set forth the terms of Plaintiff's relationship with USIIC. *See* ECF 66-9. This six-page document, written in English, contains the arbitration clause at issue in this litigation. The clause states:

9. ARBITRATION

All disputes arising out of or relating to this Agreement shall be decided by arbitration in an international venue in accordance with the Rules of the International Chamber of Commerce (ICC) unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrator shall be final and judgment may be entered in accordance with applicable law in any court having jurisdiction. Notice of the demand for arbitration shall be filed in writing with the other Party to this Agreement and with the ICC. The demand for arbitration shall be made within two (2) years after the dispute in question has arisen. If any action is necessary to enforce any of the terms of this Agreement, the prevailing Party shall be entitled to receive from the other Party all costs and fees, including reasonable attorneys' fees, and interest at the rate set forth in this Agreement.

Id. at 4-5. Perhaps unsurprisingly, Plaintiff and Defendants tell conflicting stories regarding the negotiation and signing of this contract.

Plaintiff states in his SAC and opposition to the motion to compel that he was presented with this Engagement Agreement on July 22, 2012. *See* SAC ¶ 34; *see also* Pl.'s Opp. to Mot. to

¹ Over the next year, Plaintiff would also meet with three of the other individual defendants, Michael Shadman and Violet and Pirooz Parvarandeh, *see, e.g.*, SAC ¶¶ 33, 35, 39, though he does not allege in the SAC that he ever communicated directly or met with Stacey Conti.

² Plaintiff contends in the SAC that USIIC advertised itself on its website as the "only EB-5 Regional Center organization with its foundation in United States banking," despite the fact that USIIC had not been approved by United States Citizenship and Immigration Services ("USCIS") to serve as an EB-5 Regional Center. SAC ¶ 26.

1 Compel, ECF 74 at 6. Plaintiff further states that, prior to the agreement being presented to him,
 2 “all of the conversations between Defendants and Plaintiff had been conducted in Farsi because
 3 Plaintiff only knew a few words of English.” Pl.’s Opp. to Mot. to Compel at 6-7. Plaintiff’s
 4 opposition continues:

5 However, the agreement was written in English. Plaintiff inquired
 6 about the contents of the agreement and Khazen explained the terms
 7 of the agreement in Farsi. At no point during this explanation did
 8 she mention the fact that USIIC’s Regional Center application was
 9 pending. . . . Plaintiff signed the engagement agreement only
 10 because he had been led to believe that the USIIC was an approved
 11 regional center. Khazen concealed the pending status with intention
 12 to defraud because she knew that Plaintiff would not sign the
 13 agreement if he knew the truth. Moreover, Khazen did not mention
 14 the arbitration clause and there was no place for Plaintiff to initial
 15 under the arbitration clause to indicate that he had read and
 16 understood this clause.

17 *Id.* at 7; *see also* Mohebbi Decl., ECF 74-1 ¶¶ 38, 39, 43 (“The agreement was written in English.
 18 I inquired about the contents of the agreement and Khazen explained the terms of the agreement in
 19 Farsi. . . . I was never informed about the arbitration clause I was not aware that by signing
 20 the documents that I would be agreeing to arbitration or giving up my right to go to court in the
 21 event of a dispute.”).

22 Defendants present evidence to rebut several of the statements made by Plaintiff. First,
 23 Khazen states in a signed declaration that not all of the prior conversations she had with Plaintiff
 24 took place in Farsi, and that instead they spoke “primarily in Turkish, as [Mr. Mohebbi] insisted
 25 that I must practice my Turkish.” Khazen Decl., ECF 77 ¶ 3. Khazen further states that she gave
 26 Mr. Mohebbi a “copy of USIIC’s standard Engagement Agreement” on March 30, 2012, and that
 27 this form agreement “had the same substantive terms as the version that he signed on July 22,
 28 2012.” *Id.* at ¶ 7. She states that she was informed that Mr. Mohebbi, who she says described
 himself as a “successful banker,” *id.* at ¶ 5, had “had all of the documents that I gave him
 translated, including [] the Engagement Agreement,” *id.* at ¶ 12, and that he “brought [to the July
 22 meeting] a briefcase containing documents that he informed me he had translated.” *Id.* at ¶ 13.
 She also contends that Mr. Mohebbi negotiated aspects of the Engagement Agreement at the July
 22 meeting, including the fee owed to USIIC. *Id.* at ¶¶ 14-18.

After signing the Engagement Agreement, Plaintiff claims in his SAC that he signed two additional agreements with USIIC: an Investment Questionnaire and Subscription Agreement, on October 3, 2012, which outlined the terms of his \$1,000,000 investment with Defendant USIIC LP, a limited partnership, *see* SAC Exh. 17, and a December 18, 2012 Agreement, which states that Defendants had used Plaintiff's investment to purchase 1,000,000 shares in an entity called Tri-Valley Bank, *see* SAC Exh. 19 at 2-3.³ Neither of these additional contracts contains an arbitration clause.

II. LEGAL STANDARDS

A. Motion to Compel Arbitration

Enforceability of an arbitration clause, and the determination of the scope of that clause, is governed by the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1 *et seq.* Under the FAA, arbitration agreements are "a matter of contract," and "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Such generally applicable contract defenses include "fraud, duress, or unconscionability, but not [] defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). A party seeking to invoke an arbitration agreement may petition the district court "which, save for such an agreement, would have jurisdiction [to hear the case], for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4; *see also Trompeter v. Ally Financial, Inc.*, 914 F. Supp. 2d 1067, 1071 (N.D. Cal. 2012).

A district court faced with a petition to enforce an arbitration clause engages in a limited two-part inquiry: first, it determines whether the arbitration agreement is valid, and second, it determines whether the agreement encompasses the claims at issue. *See, e.g., Mitsubishi Motors Co. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627-28 (1985); *see also Trompeter*, 914 F. Supp. 2d at 1071 ("A district court must compel arbitration under the FAA if it determines that: (1) there exists a valid agreement to arbitrate; and (2) the dispute falls within its terms."). A district court

³ Defendants contend that this December 18 agreement is unexecuted. *See* Mot. to Compel at 5.

1 does not consider challenges to the contract as a whole, but rather only specific challenges to the
 2 validity of the arbitration clause itself. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71
 3 (2010) (“There are two types of validity challenges under § 2: ‘one type challenges specifically the
 4 validity of the agreement to arbitrate,’ and ‘the other challenges the contract as a whole.’ . . .
 5 [O]nly the first type of challenge is relevant to a court’s determination whether the arbitration
 6 agreement at issue is enforceable.”).

7 When determining whether the arbitration clause encompasses the claims at issue, “all
 8 doubts are to be resolved in favor of arbitrability.” *Simula v. Autoliv*, 175 F.3d 716, 721 (9th Cir.
 9 1999) (interpreting the language “arising in connection with” in an arbitration clause to “reach[]
 10 every dispute between the parties having a significant relationship to the contract and all disputes
 11 having their origin or genesis in the contract.”).

12 **B. Motion to Dismiss Under Rule 12(b)(6)**

13 A motion to dismiss under Rule 12(b)(6) concerns what facts a plaintiff must plead on the
 14 face of his complaint. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint
 15 must include “a short and plain statement of the claim showing that the pleader is entitled to
 16 relief.” Any complaint that does not meet this requirement can be dismissed pursuant to Rule
 17 12(b)(6). In interpreting Rule 8(a)’s “short and plain statement” requirement, the Supreme Court
 18 has held that plaintiffs must plead “enough facts to state a claim to relief that is plausible on its
 19 face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), which requires that “the plaintiff[s]
 20 plead factual content that allows the court to draw the reasonable inference that the defendant is
 21 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard does
 22 not ask a plaintiff to plead facts that suggest they will probably prevail, but rather “it asks for more
 23 than a sheer possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks
 24 omitted). The Court must “accept factual allegations in the complaint as true and construe the
 25 pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &
 26 Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

III. DISCUSSION

A. Choice of Law

The Engagement Agreement does not contain a choice of law provision. *See* ECF 66-9. In general, state contract law governs the interpretation of arbitration agreements. *See, e.g., Farrow v. Fujitsu Am., Inc.*, 2014 WL 1396412, at *3 (N.D. Cal. Apr. 9, 2014). When a contract is silent as to its choice of law, federal common law determines which state’s law applies to the contract. *See, e.g., Chan v. Soc’y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997). In this circuit, the law of the state with the “most significant relationship to the transaction and the parties” is applied to the contract. *Chuidian v. Philippine Nat’l Bank*, 976 F.3d 561, 564-65 (9th Cir. 1992).

Here, though the Engagement Agreement was signed in Dubai, Plaintiff engaged in meetings with the Defendants in California during his 2012 trip to the United States. The contract is between USIIC, LLC, which has its principle place of business in California, SAC ¶ 9, and Plaintiff, an Iranian national who now resides in California, *see* SAC ¶ 8. California has the most significant relationship to the transaction and the parties, and, as no party asks the Court to interpret the Engagement Agreement pursuant to the law of any other state, California law governs the interpretation of the Engagement Agreement and, therefore, the arbitration clause contained within the Engagement Agreement.

B. The Validity of the Arbitration Clause

In his opposition, Plaintiff makes three arguments as to why the Court should decline to enforce the arbitration clause: (1) that the fraudulent execution of the contract renders the arbitration provision void; (2) that the arbitration provision itself was fraudulently induced; and (3) that the arbitration provision is unconscionable. The Court addresses each argument in turn.

1. Fraudulent Execution of the Contract

“[A] party’s challenge to another provision of the contract, *or to the contract as a whole*, does not prevent a court from enforcing a specific agreement to arbitrate.” *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (emphasis added). Plaintiff’s argument that “[c]laims of fraud in the execution of a contract are not arbitrable,” Pl.’s Opp. to Mot. to Compel at 12, is simply contrary to law. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006) (“There can be

no doubt that ‘contract’ as used [in § 2 of the FAA] must include contracts that later prove to be void.”⁴ This does not mean that Plaintiff’s allegation that the Engagement Agreement was fraudulently executed will go unheard, only that such a claim is heard by an arbitrator, not the Court.

2. *Fraudulent Inducement of the Arbitration Provision*

Plaintiff’s second argument is that there was a “lack of mutual assent as to the arbitration provision,” and that Defendants’ fraud caused Plaintiff a “lack of a reasonable opportunity to discover the existence of the arbitration provision.” Pl.’s Opp. to Mot. to Compel at 20. Plaintiff contends that “once Khazen voluntarily undertook to explain terms of the engagement agreement to Plaintiff, as she did when she reviewed the terms of the Engagement Agreement, she was under a duty to explain all of the terms of the engagement agreement completely and accurately.” *Id.* at 21. This “duty to explain,” Plaintiff argues, includes a duty to inform Plaintiff that he was signing a contract that contained an arbitration provision. *See id.* This argument is unpersuasive, for several reasons.

First, the arbitration provision is plainly included on the face of the contract. The word “ARBITRATION” is written in all capital letters, bold font, and is underlined. ECF 66-9 at 4. The contract is a mere six pages long, including the signature page. The copy of the contract provided to the Court by Plaintiff is only written on one side of the page, and there is no indication that the arbitration provision was somehow “hidden” on the back of a page of the contract. *Cf. Rodriguez v. Sim*, 2009 WL 975457, at *6 (“Fraud does not render a written contract void where the defrauded party had a reasonable opportunity to discover the real terms of the contract.”) (citing *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 419-20 (1996)). When a contract’s arbitration provisions are clear and conspicuous, as they are here, the party owes no duty to point them out to the other party. *See Chase v. Blue Cross of Calif.*, 42 Cal. App. 4th 1142, 1155 (1996).

Second, Plaintiff’s inability to read English does not render the terms of the arbitration

⁴ The cases cited by Plaintiff for this proposition, including *Larian v. Larian*, 123 Cal. App. 4th 751, 760 (2004), and *Ford v. Shearson Lehman Am. Express, Inc.*, 180 Cal App. 3d 1011, 1028 (1996), predate the Supreme Court’s holdings in *Buckeye Check Cashing* and *Rent-A-Center*.

1 agreement invalid. A party cannot avoid the terms of an agreement he signs on the ground that he
 2 did not understand the language in which the contract was written. *See, e.g., Madden v. Kaiser*
 3 *Found. Hospitals*, 17 Cal. 3d 699, 710 (1976) (stating the “general rule that one who assents to a
 4 contract is bound by its provisions and cannot complain of unfamiliarity with the language of the
 5 instrument”). Courts in California and across the country have consistently held that a party cannot
 6 avoid an arbitration clause simply because the contract is written in another language. *See id.*;
 7 *Bolanos v. Khalatian*, 231 Cal. App. 3d 1586, 1590 (1991) (holding that an arbitration clause, like
 8 any other contract clause, cannot be avoided merely because of an inability to read the language in
 9 which it was written); *see also Gerike v. Rent-A-Center, Inc.*, 2014 WL 3592094 (D.P.R. June 27,
 10 2014) (“Moreover, the fact that the document was in Spanish, a language unfamiliar to [plaintiff]
 11 at the time, also does not negate her consent.”); *Modern Space Design & Decoration (Shanghai)*
 12 *Co. v. Lynch*, 2014 WL 4897322 (N.D. Ill. Sept. 29, 2014); *Torres v. Major Auto. Grp.*, 2014 WL
 13 4802985 (E.D.N.Y. Sept. 25, 2014). This is particularly true when the contracting parties are
 14 sophisticated entities, as here – Plaintiff was a businessman who was signing a contract to invest at
 15 least \$1 million with USIIC in exchange for, he believed, their assistance in helping him obtain an
 16 EB-5 visa. *See, e.g., SAC* ¶ 22.

17 Plaintiff’s argument that Khazen undertook a duty to translate the document for him, and
 18 translated it incompletely in order to obfuscate the presence of the arbitration agreement, is
 19 similarly unavailing. Mr. Mohebbi’s declaration states only that he “inquired about the contents of
 20 the agreement and Khazen explained the terms of the agreement in Farsi.” Mohebbi Decl. ¶ 39. In
 21 contrast to this statement, Khazen’s declaration includes several pieces of uncontested evidence
 22 that support an inference that she did not undertake any affirmative duty to translate the
 23 Engagement Agreement. She first states that she gave Mr. Mohebbi a form copy of the
 24 Engagement Agreement on March 30, nearly four months prior to the July 22 meeting in which he
 25 signed the Engagement Agreement. Second, she points to an email from Fetneh Seif, the tour
 26 guide that Mr. Mohebbi declares arranged a meeting between him and Ms. Khazen, *see* Mohebbi
 27 Decl. ¶ 13. This email states that Mr. Mohebbi obtained translations of the documents Ms. Khazen
 28

1 had provided him. *See* Khazen Decl. ¶ 12 Exh. B.⁵ Finally, she states that Mr. Mohebbi “brought a
2 briefcase containing documents that he informed me he had translated” and attempted to negotiate
3 terms of the Engagement Agreement, including the administrative fee. *Id.* at ¶¶ 13-14.

4 Plaintiff does not rebut the statements made in Ms. Khazen’s declaration, and as such does
5 not meet his heavy burden to show that Khazen undertook an affirmative duty to translate the
6 document for him, let alone that she then translated that document incorrectly and purposefully hid
7 from him the existence of the arbitration clause.⁶

8 3. Unconscionability

9 To be unenforceable under California law, a particular contract provision must be both
10 procedurally and substantively unconscionable. *Armendariz v. Found. Health Psychcare Servs.*, 24
11 Cal. 4th 83, 114 (2000). Though both elements must be present, they need not be shown to the
12 same degree – “the more substantively oppressive the contract term, the less evidence of
13 procedural unconscionability is required to come to the conclusion that the term is unenforceable.”
14 *Id.*; *see also A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 487 (1982). Procedural
15 unconscionability focuses on whether the contract was signed under conditions of oppression or
16 surprise, or if the contract was one of adhesion. *See Flores v. Transamerica HomeFirst, Inc.*, 93
17 Cal. App. 4th 846, 853 (2001). In contrast, substantive unconscionability is concerned with
18 whether the contract is “overly harsh” or “generates one-sided results.” *See Armendariz*, 24 Cal.
19 4th 83, 114; *see also Concepcion*, 131 S. Ct. 1740, 1746.

20 The Court first considers whether the contract is procedurally unconscionable. The contract
21 is not one of adhesion, which requires it be “imposed and drafted by the party of superior
22 bargaining strength, [and] relegates to the subscribing party only the opportunity to adhere to the
23

24 ⁵ The Court considers this statement not for the truth of the matter asserted, but rather to show Ms.
25 Khazen’s reasonable belief that Mr. Mohebbi had the documents translated, making it unlikely
26 that she would undertake an obligation to translate the Engagement Agreement for him at the July
22 meeting.

27 ⁶ Further, the undisputed evidence that Khazen gave Plaintiff a form copy of the Engagement
28 Agreement four months prior to his signing the Agreement, Khazen Decl. ¶ 7, means that Plaintiff
had sufficient time to seek out translation of the document, and thus should be bound by its terms
even if he elected not to do so. *Cf. Madden v. Kaiser Found. Hospitals*, 17 Cal. 3d 699, 710.

contract or reject it.” *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071 (2003). The undisputed evidence before the Court, as discussed above, shows that Plaintiff had ample opportunity negotiate the terms of the contract, and in fact did negotiate more favorable terms of the contract. *See, e.g.*, Khazen Decl. ¶¶ 14-18. The arbitration clause was not imposed upon Plaintiff by surprise, as Khazen declares that she gave a copy of USIIC’s standard engagement agreement, which “had the same substantive terms as the version that [Mohebbi] signed,” four months prior to the July 22 meeting where Mr. Mohebbi signed the contract. *Id.* at ¶ 7. This clause is not the type of “take it or leave it” provision that California courts have deemed procedurally unconscionable. *Cf. Flores*, 93 Cal. App. 4th 846, 853-54. Though Plaintiff states in his declaration that he would not have signed the contract had he known that it contained an arbitration agreement and that he was therefore giving up his right to have disputes heard by a court, *see* Mohebbi Decl. ¶ 43, the Court reiterates that Mr. Mohebbi cannot attempt to avoid the terms of a clear and conspicuous arbitration clause merely because he did not speak the language in which the contract was written. *See, e.g., Madden*, 17 Cal. 3d 699, 710.

Having found no procedural unconscionability, the Court cannot deem the arbitration clause unenforceable. *See Armendariz*, 24 Cal. 4th 83, 114. That being said, the Court also finds no indication that the arbitration clause was substantively unconscionable. Courts in California have held that an arbitration clause is not unconscionable if there is a “modicum of bilaterality in the arbitration remedy.” *Flores*, 93 Cal. App. 4th 846, 854 (citing *Armendariz*, 24 Cal. 4th 83, 117). Under the terms of this arbitration clause, either party may enforce the clause against the other, with regard to any dispute “arising out of or relating to this Agreement.” ECF 66-9 at 5. The arbitration clause does not mandate a particular procedure “wholly or largely to [one party’s] benefit at the expense of the party on which the arbitration is imposed.” *Trompeter*, 914 F. Supp. 2d 1067, 1073 (citing *Little*, 29 Cal. 4th 1064, 1072). Any and all disputes must go to arbitration, no matter which party brings them. This is not a circumstance, like was the case in *Trompeter*, where the defendant is able to take advantage of multiple remedies while the Plaintiff is limited to arbitration. *Id.* at 1073-74 (finding an arbitration clause substantively unconscionable because the defendant was able to take advantage of self-help remedies and arbitration in the event of a

consumer default, while the consumer was only able to take advantage of arbitration).

The evidence before the Court shows no indication of either procedural or substantive unconscionability, let alone the showing of both required to deem the arbitration provision unenforceable. The arbitration agreement is therefore enforceable.⁷

C. Which Causes of Action Fall Within the Ambit of the Arbitration Clause

The Court now turns to a determination of which of Plaintiff's 22 causes of action fall within the ambit of the arbitration clause. Defendants claim that "Plaintiff has pled himself into a position where the entirety of his action is subject to arbitration" because of his insistence that the claims brought in the SAC are intertwined with one another. *See* Defs.' Mot. to Compel at 6-7 (citing the Court's June 12, 2014 Hearing Transcript in which Plaintiff's counsel stated: "The problem is that all claims are intertwined together"). Plaintiff has made no effort in his Opposition to disaggregate which claims are arbitrable and which are not, instead arguing that "Defendants have failed to demonstrate that the SAC is suing over the engagement agreement at all." Pl.'s Opp. to Mot. to Compel at 25.

The express language of the Engagement Agreement, however, says otherwise: "All disputes arising out of or relating to this Agreement shall be decided by arbitration" ECF 66-9 at 5. This circuit has made clear that, when an otherwise-valid arbitration agreement includes such broad language, "all doubts are to be resolved in favor of arbitrability." *Simula*, 175 F.3d 716, 721 (finding that the claims in the complaint need only "touch matters" covered by the agreement containing the arbitration provision); *see also Chiron Corp. v. Ortho Diag. Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000). Claims subject to such arbitration agreements include any

⁷ Though the contract is signed by Ms. Khazen, as CEO of USIIC, *see* ECF 66-9 at 6, the arbitration clause can be enforced by all Defendants because the claims against those Defendants are encompassed by the express terms of the arbitration clause. *See, e.g., EFund Cap. Partners v. Pless*, 150 Cal. App. 4th 1311, 1323 (2007); *see also Michaelis v. Schori*, 20 Cal. App. 4th 133, 139 (1993) (permitting a non-signatory to a contract that included an arbitration clause to enforce the terms of that clause because the clause "sufficiently encompass[ed]" causes of action against him); *Wolf v. Langemeier*, 2010 WL 3341823 (E.D. Cal. Aug. 24, 2010) (holding that a willing non-signatory to an agreement may enforce the arbitration clause contained in the agreement). Here, the arbitration clause broadly encompasses "all disputes arising out of or relating to" the Engagement Agreement, which undoubtedly includes within it claims against other individuals employed by or otherwise affiliated with USIIC.

claims regarding the contract itself, but extend as far as “tort claims having their root in the contractual relationship.” *EFund Cap. Partners*, 150 Cal. App. 4th 1311, 1323.

The Court, however, cannot simply send all claims to arbitration merely because Plaintiff has possibly intertwined arbitrable causes of action with non-arbitrable causes of action. As the Supreme Court held in a recent *per curiam* decision, *KPMG v. Cocchi*, courts must “examine a complaint with care to assess whether any individual claim must be arbitrated.” 132 S. Ct. 23, 26 (2011) (*per curiam*). Those that are arbitrable must be compelled to arbitration, while those that are not arbitrable remain with the Court and must be stayed pending the completion of arbitration. *See* 9 U.S.C. § 3. The Court thus must determine which causes of action “touch matters” covered by the Engagement Agreement.

The causes of action in the SAC can be divided into five groups, which the Court discusses in detail below.

I. RICO claims

The first, second, and third causes of action in the SAC are for violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962 *et seq.*: § 1962(a) (count 1), § 1962(b) (count 2), and § 1962(d) (count 3). These causes of action address an alleged RICO conspiracy outlined in the SAC at paragraphs 214 through 227, discussing a purported criminal enterprise encompassing all Defendants and consisting of alleged “money laundering, mail, and wire fraud, committed by each Defendant.” SAC ¶ 219. Plaintiff claims that Defendants engaged in this criminal enterprise in order “to obtain the property of plaintiff and others through illegal conduct.” *Id.* Plaintiff includes as a part of this criminal enterprise the alleged misrepresentations that caused him to sign the Engagement Agreement. *Id.* at ¶¶ 219, 221.

The United States Supreme Court has held that RICO claims can be “effectively vindicate[d]” in an arbitral forum, and that “nothing in RICO’s text or legislative history otherwise demonstrates congressional intent to make an exception to the [Federal] Arbitration Act for RICO claims.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987). Since Plaintiff’s RICO claims plainly “touch matters” covered by the Engagement Agreement, as the alleged criminal enterprise to defraud Plaintiff included the Defendants’ purported misrepresentations

regarding the Engagement Agreement, *see* SAC ¶ 219, these three causes of action are arbitrable.

2. *Claims related to the sale of securities*

A number of Plaintiff's causes of action concern violations of various state and federal securities laws: Sections 5(a) and 5(c) of the Securities Act (count 4), Section 10(b) of the Exchange Act (count 5), Section 203(a) of the Advisers Act (count 6), and California Corporations Code § 25401 *et seq.* (count 7) and § 25110 (count 8). Plaintiff also brings a cause of action for violations of California Business and Professions Code § 17000 and § 17200 (count 14).⁸

"The [Federal] Arbitration Act, standing alone, [] mandates enforcement of agreements to arbitrate statutory claims. . . . The burden is on the party opposing arbitration [] to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. 220, 226-27. Courts have found that claims arising under federal securities laws are arbitrable, *see, e.g., id.* at 232-33 (holding that claims under § 10(b) of the Exchange Act were arbitrable); *see also Elliott v. Albright*, 209 Cal. App. 3d 1028, 1036 ("Arbitration is appropriate for claims under the 1933 [Securities] Act."), and have also found that claims arising from California securities statutes are arbitrable, *see, e.g., Wolf v. Langemeier*, 2010 WL 3341823 (E.D. Cal. Aug. 24, 2010) (compelling arbitration of two causes of action under § 25110). Courts have further found that causes of action brought pursuant to California's unfair business practices statutes are arbitrable. *See Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1199-1200 (S.D. Cal. 2001) *overruled in part on other grounds by Ting v. AT&T*, 319 F.3d 1126, 1150 n.14 (9th Cir. 2003) (finding that claims for relief brought under § 17200 are arbitrable); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) (same). Nothing in the language of these statutes expressly precludes arbitration as an appropriate forum for vindicating a plaintiff's claim. *Cf. Mitsubishi Motors*, 473 U.S. 614, 627 ("[T]he [Arbitration] Act itself provides no basis for disfavoring agreements to arbitrate statutory claims.").

Plaintiff's claims regarding violations of state and federal securities law, as well as California's Unfair Business Practices Act, all "touch matters" covered by the Engagement

⁸ Count 14 also includes violations of § 17500, California's false advertising statute, which the Court addresses in detail below in Part III.C.5.

1 Agreement. The Engagement Agreement outlined the relationship between the parties that
 2 ultimately gave rise to the investment relationship between Plaintiff and USIIC. *See* ECF 66-9 at 2
 3 (discussing USIIC’s obligation to “identify investment opportunities” for Plaintiff). As such, these
 4 securities and unfair business practices claims, arising from Plaintiff’s purchase of 1,000,000
 5 shares of Tri-Valley Bank, fall within the ambit of the arbitration clause contained in the
 6 Engagement Agreement, and are arbitrable.

7 3. Common law fraud claims

8 Plaintiff’s SAC includes four claims for various forms of fraud: fraud in the inducement of
 9 the Engagement Agreement (count 9), fraud in the execution or inception of the Engagement
 10 Agreement (count 10), fraudulent misrepresentation in regard to the October 3 Investment
 11 Questionnaire (count 11), and fraudulent misrepresentation in regard to the December 18
 12 Agreement (count 12).

13 A claim for fraud that is related to the contractual agreement as a whole must be decided
 14 by an arbitrator. This is different from a claim for fraudulent inducement of the arbitration clause
 15 itself, which must be decided by the court. *See, e.g., Prima Paint*, 388 U.S. 395, 408. These four
 16 causes of action all relate to contractual agreements as a whole, and are not specific to the
 17 fraudulent inducement of an arbitration clause contained within these documents. Neither the
 18 October 3 Investment Questionnaire nor the December 18 Agreement contains an arbitration
 19 clause. However, claims relating to fraudulent inducement of these two contracts “touch matters”
 20 with regard to the Engagement Agreement, and are therefore arbitrable. The Investment
 21 Questionnaire expressly outlines the terms of Plaintiff’s investment with USIIC, made in order to
 22 obtain an EB-5 visa. *See, e.g., SAC ¶ 327(3)*. The December 18 Agreement includes a description
 23 of Defendants’ purchase of Tri-Valley Bank shares using Plaintiff’s investment. *See, e.g., SAC ¶*
 24 *371*. Both of these investment contracts are specifically contemplated by the Engagement
 25 Agreement, which “establishe[d] the terms and conditions of engagement by Saied Mohebbi . . .
 26 with the US Immigration Investment Center.” ECF 66-9 at 1. USIIC was to identify and review
 27 potential investment opportunities for Plaintiff. *Id.* at 1-2. Future contracts that set forth the *actual*
 28 investments thereafter made by USIIC fall plainly within the terms of the arbitration clause, which

1 instructs all disagreements “arising out of or relating to” to Engagement Agreement to be
2 arbitrated. *Cf. Gross v. Recabaren*, 206 Cal. App. 3d 771, 777 (1988) (compelling arbitration of
3 claims arising after the initial contract was signed, after examining the language of the arbitration
4 clause to determine that “[i]t is manifest that the contract signed by [plaintiff] cannot, on its face,
5 reasonably be said to be limited only to those services provided contemporaneous to its signing”).
6 As such, Plaintiff’s fraud claims are arbitrable.

7 4. *Common law contract and tort claims*

8 Plaintiff brings three breach of contract claims: breach of the Engagement Agreement
9 (count 15), breach of the Investment Questionnaire (count 16), and breach of the December 18
10 agreement (count 17). He also brings a claim for breach of the implied covenant of good faith and
11 fair dealing (count 18), as well as causes of action for diversion of funds (count 19), conversion
12 (count 20), and seeking an accounting and constructive trust (count 22).

13 Claims for breach of the Engagement Agreement, as well as for breach of the October 3
14 and December 18 agreements that arose out of the relationship between Plaintiff and USIIC, are
15 arbitrable under the plain language of the Engagement Agreement’s arbitration clause. ECF 66-9
16 at 5 (“All disputes arising out of or relating to this Agreement shall be decided by arbitration.”).
17 Similarly, claims for breach of the implied covenant of good faith and fair dealing are arbitrable
18 when the underlying contract claim is arbitrable. *See, e.g., Las Vegas Sands, Inc. v. Culinary*
19 *Workers Union Local No. 226*, 82 Fed. App’x. 580, 584 (9th Cir. 2003) (“Because the implied
20 covenant claim implicates the entire [contract], arbitration is the proper forum for its resolution.”).
21 Plaintiff’s claims for diversion of funds and conversion arise out of the funds paid to USIIC
22 consistent with the terms of the three agreements at issue, and are therefore also arbitrable. *See*
23 *EFund Cap. Partners*, 150 Cal. App. 4th 1311, 1325 (“It has long been the rule in California that a
24 broadly worded arbitration clause, such as we have here, may extend to tort claims that may arise
25 under or from the contractual relationship.”) (citing *Coast Plaza Doctors Hosp. v. Blue Cross of*
26 *Calif.*, 83 Cal. App. 4th 677, 685-86 (2000)). Plaintiff’s claim seeking an accounting and
27 constructive trust also arises out of his contention that Defendants’ violated the fiduciary
28 relationship they owed him by virtue of the contracts signed between the parties. *See* SAC ¶ 443.

Thus this claim is also subject to arbitration, as it relates directly to the Engagement Agreement.

5. *Claims Not Subject to Arbitration: False Advertising and Rescission*

Plaintiff brings two causes of action alleging false advertising: violation of the Lanham Act (count 13) and § 17500 of the California Business and Professions Code (part of count 14). Plaintiff also brings a claim for rescission of the arbitration clause, which asks the Court to find that the clause was void because it was procured by fraud (count 21).

a. *False Advertising*

Plaintiff's false advertising claims relate to the alleged misrepresentations made by Defendants on USIIC's website, *see, e.g.*, SAC ¶ 229, and include his allegation that USIIC misrepresented itself as a qualified Regional Center designated by the USCIS for the purpose of assisting investors in applying for EB-5 visas. *See* SAC ¶ 231. Though false advertising claims are arbitrable, *see Kaltwasser*, 812 F. Supp. 2d 1042, 1050, this alleged false advertising, and Plaintiff's purported reliance on it, occurred *prior* to his signing of the Engagement Agreement with USIIC. Because the arbitration clause does not explicitly encompass claims that predate the signing of the Engagement Agreement, Plaintiff's false advertising claims are not arbitrable. *See, e.g., Morse v. Servicemaster Global Holdings, Inc.*, 2012 WL 4755035, at *5 (N.D. Cal. Oct. 4, 2012) (holding that the language of an arbitration agreement must be "retroactive on its face" to encompass claims that predate the execution of the arbitration agreement).

b. *Rescission*

Plaintiff's claim for rescission (count 21) is merely a request that the Court find that the arbitration clause *itself* is unenforceable because it was procured by fraud. *See* SAC ¶ 440 ("Plaintiff seeks a finding of rescission and that the [arbitration] clause was invalid ab initio due to fraud . . ."). Unlike a claim for rescission of the contract as a whole, a claim seeking only rescission of the arbitration agreement is not arbitrable; rather, under the FAA, such a claim is adjudicated by the Court. *See* 9 U.S.C. § 4 (stating that the Court shall "hear and determine" issues regarding the making of the arbitration clause); *Rosenthal*, 14 Cal. 4th 394; *Chiron*, 207 F.3d at 1126, 1130.

As the Court has discussed at length above, *see supra* Part III.B, the arbitration clause is

1 enforceable because Plaintiff has failed to put forth sufficient evidence to carry his heavy burden
2 to show that the arbitration clause itself was fraudulently induced. By finding the arbitration
3 agreement validly entered into, and granting Defendants’ motion to compel arbitration, the Court
4 has adjudicated Plaintiff’s twenty-first cause of action for rescission, and found it without merit.
5 *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1269 (2006) (“[I]f the claim is fraud in the
6 inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement
7 to arbitrate—the federal court may proceed to adjudicate it.”) (citing *Prima Paint*, 388 U.S. at
8 403-04).

9 In *Abreu v. Slide, Inc.*, a court in this district was faced with a similar situation as here: a
10 party’s complaint included a number of causes of action that fell within the ambit of an arbitration
11 clause, but also included a single cause of action challenging the validity of the arbitration clause
12 itself. 2012 WL 2873772 (N.D. Cal. July 12, 2012) (adjudicating both a motion to dismiss and a
13 motion to compel arbitration). The court in *Abreu* treated the claim challenging the validity of the
14 arbitration agreement in the same manner as this Court has – by determining whether or not the
15 arbitration agreement was valid. *Id.* at *4-5. Determining that the arbitration clause was validly
16 entered into, the *Abreu* court compelled arbitration, which adjudicated the entirety of plaintiff’s
17 claims regarding the validity of the arbitration clause. *Id.* at *6 (sending all claims to arbitration,
18 including any claim to the contract “unrelated to the validity of the arbitration provision”).

19 Since Plaintiff’s entire twenty-first claim involves his challenge to the arbitration clause,
20 *see* SAC ¶ 440 (“Plaintiff seeks a finding of rescission and that the clause was invalid ab initio due
21 to fraud), the Court’s determination that the arbitration agreement was validly entered into
22 disposes of Plaintiff’s claim for rescission. As such, Plaintiff’s claim for rescission is
23 DISMISSED. *See* 9 U.S.C. § 4 (stating that the Court shall “determine” any issue regarding the
24 making of an arbitration agreement).

25 **D. Defendants’ Motion to Dismiss**

26 Defendants also move to dismiss nearly all of Plaintiff’s claims: his first through
27
28

nineteenth causes of action, as well as his twenty-first and twenty-second causes of action.⁹

1. Plaintiff's Claims Subject to Arbitration

The Court declines to consider Defendants' motion to dismiss with regard to all causes of action that the Court has ordered are subject to arbitration: the first through twelfth causes of action, the § 17000 and § 17200 claims in the fourteenth cause of action, the fifteenth through twentieth causes of action, and the twenty-second cause of action. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627; *Buckeye Check Cashing*, 546 U.S. 440, 446.

2. Plaintiff's Lanham Act Claim

Because Plaintiff's false advertising claims are not subject to arbitration, the Court must consider Defendants' motion to dismiss Plaintiff's Lanham Act claim.¹⁰

Plaintiff's Lanham Act claim is brought under section 43(a), which requires the Plaintiff to plead five elements:

(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

Plaintiff outlines the facts pertaining to his Lanham Act claim in paragraphs 228 through 239 of the SAC. In this section, Plaintiff reiterates his argument that USIIC made a false statement about its status as an EB-5 Regional Center and the speed with which it could help its clients achieve residency in the United States:

U.S. Immigration Investment Center (USIIC) is the only EB-5 Regional Center organization with its foundation in United States banking. USIIC is an EB-5 organization assisting VIPs, entrepreneurs, and successful professionals from around the world to invest in the recapitalization of U.S. Community and Private Banks and create or preserve jobs while achieving the fastest path to U.S.

⁹ Plaintiff's eighteenth cause of action for conversion survived Defendants' first motion to dismiss. *See* ECF 64 at 29-30.

¹⁰ The Court previously dismissed this claim with leave to amend. *See* ECF 64 at 31-32. Plaintiff's § 17500 claim, however, survived Defendants' first motion to dismiss. *See* ECF 64 at 33.

residency and citizenship.

SAC ¶ 229.

Plaintiff later states that “Defendants knew or should have known that USIIC was using the Internet and advertised falsely its services as ‘to obtain the fastest path to U.S. residency through its regional centers and the Limited Partnership, created specifically for each EB-5 Regional Center project.’” SAC ¶ 391.

“[A] false advertising cause of action under the [Lanham] Act is not limited to literal falsehoods; it extends to false representations made by implication or innuendo.” *Cook, Perkiss & Liehe, Inc. v. No. Calif. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990). Plaintiff contends that USIIC falsely advertised its services by insinuating that it was a USCIS-approved EB-5 Regional Center, through its use of the phrase “only EB-5 Regional Center organization,” and thus induced Plaintiff to sign the Engagement Agreement and purchase securities. Unlike in the FAC, where Plaintiff made a single conclusory statement regarding Defendants’ false statements about “advertis[ing] the offering and sale of securities,” *see* FAC, ECF 29 ¶ 198, Plaintiff in the SAC alleges that Defendants’ falsehood was with regard to the services it provided to EB-5 applicants, and that a knowingly false statement about its status as an approved EB-5 Regional Center would prevent USIIC from providing Plaintiff the services it otherwise promised.

A false statement about the character of the company providing a service is sufficient to state a claim under the Lanham Act. *See, e.g., Cook*, 911 F.2d 242, 245 (“NCC makes one overt statement about its own services on its advertisement: “[W]e’re the low cost commercial collection experts.”). The Court finds Plaintiff’s pleading sufficient for purposes of stating a claim under the Lanham Act. Plaintiff pleads the existence of a false statement about a service, actual deception that was material to Plaintiff’s purchase, the existence of the statement in interstate commerce (where the statement was written on USIIC’s website and accessed by Plaintiff in Iran, *see* SAC ¶ 21), and resulting injury. SAC ¶¶ 232-239.

As such, Defendants’ motion to dismiss Plaintiff’s Lanham Act claim is DENIED.

E. Defendants’ Motion to Stay the Litigation Pending Arbitration

Pursuant to the Federal Arbitration Act, when a court determines that some claims are

arbitrable while some are not, the claims that are not arbitrable must be stayed pending the completion of arbitration. 9 U.S.C. § 3 (“[The Court,] on application of one of the parties [must] stay the trial of the action until such arbitration has been held in accordance with the terms of the agreement.”). As such, Plaintiff’s false advertising claims in counts 13 and 14 must be stayed pending the completion of arbitration as to the remaining claims.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants’ motion to compel arbitration is GRANTED as to counts 1 through 12, the § 17000 and § 17200 claims in count 14, counts 15 through 20, and count 22. Defendants’ motion to compel arbitration is DENIED as to count 13 and the § 17500 claims in count 14.


2. Defendants’ motion to dismiss count 13 is DENIED. Defendants’ motion to dismiss count 21 is GRANTED. The Court DECLINES TO RULE on the remainder of Defendants’ motion to dismiss because the remaining claims have been compelled to arbitration.

3. Defendants’ motion to stay the litigation as to counts 13 and the § 17500 claims in count 14 is GRANTED.

4. The parties are FURTHER ORDERED to file with the Court, no later than December 4, 2015, a two-page letter updating the Court as to the status of arbitration.

IT IS SO ORDERED.

Dated: December 4, 2014


BETH LABSON FREEMAN
United States District Judge